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Supreme Court of the United States

OCTOBER TERM 1929

No. 363

GEORGIA POWER COMPANY, *Petitioner*

VS.

CITY OF DECATUR, *Respondent*

Petition for Certiorari

Brief in Opposition to Writ

Hooper Alexander

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1929

No. 363

GEORGIA POWER COMPANY PETITIONER
VS.
CITY OF DECATUR
PETITION FOR CERTIORARI

STATEMENT OF THE ISSUES

Respondent is of opinion that this record and petition presents no federal question of any kind, unless, possibly, that the whole matter is res judicata.

Something like twenty-five years ago the Georgia Railway & Electric Company had built or acquired three lines of electric railway between Atlanta and Decatur, two of which ran north of the Georgia Railroad.

Of these two, one had been built some years earlier by The Atlanta Railway Company, and the other, the line now in controversy, had been recently built by the company named, or a predecessor out of which it had evolved.

For reasons satisfactory to itself, the Georgia Railway & Electric Company decided to dismantle the older of the two roads referred to and started work to that end. The City of Decatur began litigation to prevent this, and, pending this controversy, there was an agreement between the City and the Electric Company by the terms of which the tearing up of

the old road was permitted, the Company agreeing to carry passengers thereafter upon terms named in the contract.

The contract was fully authorized on both sides by ordinance of the City and resolution of the Directors, and appears to have been drawn with much care and deliberation on both sides. Since that time it has been before this and other courts in various forms and its validity and binding force have been fully sustained, as well as the competency of the city government to make such a contract.

About 1912 the Electric Company leased all its properties to the Georgia Railway & Power Company for a long term of years, and the latter company was in possession and operating these properties when the present litigation was begun.

From the charters of both companies and the lease contract, it appears that the line now in controversy was part of an entire system which the Electric Company was by charter authorized to operate, which the Power Company was by charter authorized to operate, and which was leased by the Electric Company to the Power Company on the covenant of the latter to operate.

After the validity of this contract had been several times upheld by this and other courts, the two companies, in 1925, determined to tear up and abandon so much of this road as lies in what is known as the five

cent zone in Decatur, but to keep the balance of the road and continue to operate it. To this end the Companies gave notice accordingly to the City, and offered to the City to surrender its permits and franchises.

Ther. upon the present action was brought to enjoin the abandonment of the property and the discontinuance of the service. An injunction was granted as prayed and the case went to the Supreme Court of Georgia on writ of error.

As preliminary to any argument and as part of the statement necessary to inform the court, it is needful to refer to and remove a legal error on the part of the petitioner.

The whole of its argument and brief is impregnated with the notion that Decatur and other towns and DeKalb County have at some time or other granted to it or its predecessors certain so-called "franchises". This is a confused notion in the minds of its counsel reflecting a failure to understand a constitutional limitation in Georgia. None of these municipalities ever had or could have granted any "franchise" at all, either to be or to do.

Both these franchises are granted by the state. But since the state of Georgia is sovereign owner of all the highways, and can do as it pleases with them, and yet the cities build and maintain their streets and the counties build and maintain their highways, it was long ago thought wise and just by the ultimate sovereign to protect these subdivisions of the state

government against the danger of whimsical grants by the legislature, (which is merely another sub agent,) and, for this reason the Constitution of 1877 was made to contain this provision:

> "The General Assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Code 6448

Later on in 1892 the Legislature itself made a similar renunciation in favor of the counties.

Under these provisions there were, no doubt, many permits granted or consents given, and these the petitioners constantly refer to as franchises, an inaccuracy which tends to confuse. Indeed the consents themselves sometime style themselves "franchises."

To the City of Decatur it seems so clear that the the issues tendered by petitioner's brief are patently not federal, that no argument is at this time made. With this brief, however, there are filed certain copies of the city's brief in the Supreme Court of Georgia, which will be found convenient if the Justices should care to inquire of the merits of the issues tendered.

The legal history of the matter is as follows:

In the year 1907 hte powers of the Railroad Commission, now known as the Public Service Commis-

sion, were extended to include supervision of trolley companies, but excepting the case of any city having a contract. The language used in the saving was as follows:

> "Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company."

(See Georgia Code 2662.)

In 1918 the Company sought by mandamus to compel the Railroad Commission to disregard the contract and fix rates notwithstanding the Act of 1907 and the Supreme Court sustained the act in 149 Georgia, page 1.

Afterwards in 1920 the Company sought to raise the rate of fare to seven cents and this was enjoined, the decision being affirmed in Georgia Railway & Power Co. vs. Town of Decatur, 152 Ga., 143, which decision was in turn affirmed by this Court in 262 U. S., 432, this Court, on page 438 directing attention to the fact that, since the rate was matter of contract, no federal question of confiscation existed.

Afterwards the same case was up again in the Supreme Court of Georgia and it was reaffirmed and language used of a somewhat vigorous character as to the finality of the decisions.

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Ga. Rwy. & P. Co., 329 Ga., 329, (331, 334.)

The present case arose in 1925 upon the occasion of an offer by the Company to surrender its rights and an announcement of its purpose to tear up and discontinue its line in the city. The final decision is not yet reported but is set out in the Transcript.

In view of this history and upon an inspection of the petition and its complaints we submit that there is no federal question made. For this reason we ask that the wirt be denied.

Respectfully Submitted

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For Respondent, the City of Decatur.